

ALLAGUI (Migration) [2018] AATA 2435 (25 May 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mrs SAMIRA ALLAGUI

VISA APPLICANT: Mr Ayman Shaaban Elshafey Khlel

CASE NUMBER: 1727804

DIBP REFERENCE(S): BCC2017/200064

MEMBER: Michael Cooke

DATE: 25 May 2018

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211 of Schedule 2 to the Regulations
- cl.309.221 of Schedule 2 to the Regulations

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2:34pm

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Statement made on 25 May 2018 at

CATCHWORDS

Migration – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) - Whether a genuine spousal relationship exists – Necessarily limited evidence of joint finances and household responsibilities – Relationship held out to others – Relationship viewed as continuous and ongoing – Significant hardship suffered by sponsor due to separation from the visa applicant – Decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cls 309.211, 309.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 5 November 2017 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 16 January 2017 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.309.211.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because the parties did not meet the definition of spouse.
4. The review applicant was represented in relation to the review by her registered migration agent.
5. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The issue in the present case is whether the parties meet the definition of spouse and are in a genuine and continuing spouse relationship at time of application and decision.

SPOUSE/DE FACTO (cl.309.211(2), cl.309.221)

Whether the parties are in a spouse or de facto relationship

7. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
8. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

9. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. On the evidence (an Egyptian Marriage Certificate), the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

10. Findings and reasons about:
- Financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.
11. The parties necessarily live apart for geographical and visa reasons. Nevertheless they have both sent each other money according to the delegate. The sponsor is a widow with 3 young children and relies on benefits. The Tribunal is satisfied on the evidence before it that the applicant meets the requirements of reg.1.15A(3)(a)(i)-(v).
- Nature of the household – including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.
12. The parties necessarily live apart for geographical and visa reasons. However, they have provided the delegate with evidence of having spent 3 weeks together in an apartment in Cairo following his marriage. The Tribunal is satisfied on the evidence before it that the applicant meets the requirements of reg.1.15A(3)(b)(i)-(iii).
- Social aspects of the relationship – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.
13. The Tribunal is satisfied from the evidence presented to the delegate that the parties represent themselves to other people as being married to each other and undertake joint social activities when able. The Tribunal is satisfied on the evidence before it that the applicant meets the requirements of reg.1.15A(3)(c)(i)-(iii).
- Nature of persons' commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.
14. The applicant according to the delegate had a sound knowledge of the applicant's circumstances. She has indicated to the Tribunal in submissions and medical report that she is suffering the absence of her husband. The Tribunal is satisfied that the parties are committed to each other and see the relationship as long-term. The Tribunal is satisfied on the evidence before it that the applicant meets the requirements of reg.1.15A(3)(d)(i)-(iv).
- Any other relevant considerations.
15. The Tribunal is concerned that the time taken for her to reunite with her husband has caused some serious psychological issues for the sponsor. These when added to her burdensome parental responsibilities as a widow have weighed heavily on the sponsor.

16. The Tribunal has considered r.1.15A(3) matters and makes the following findings against s.5F(2)(b)-(d). The parties have a mutual commitment to shared life to the exclusion of others; a genuine and continuing relationship; and they live together or not separately and apart on a permanent basis.
17. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
18. Therefore the visa applicant meets cl.309.211 and cl.309.221.
19. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

20. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations

Michael Cooke
Senior Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).